NO. 14201

United States
COURT OF APPEALS
for the Ninth Circuit

CHET L. PARKER and LOIS M. PARKER,
Appellants,

vs.

TITLE AND TRUST COMPANY, a corporation; PAUL WINANS, ETHEL WINANS, ROSS M. WINANS, AUDUBON WINANS and LINNAEOUS WINANS,
Appellees,

and

WALTER STEGMANN,
Appellant,

vs.

TITLE AND TRUST COMPANY, a corporation; PAUL WINANS, ETHEL WINANS, ROSS M. WINANS, AUDUBON WINANS and LINNAEOUS WINANS,
Appellees.

PETITION OF APPELLEES WINANS FOR CLARIFICATION OF OPINION AND FOR REHEARING

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To *the HONORABLE WILLIAM DENMAN, Chief Judge, and HOMER T. BONE and WALTER L. POPE, Circuit Judges of the United States Court of Appeals for the Ninth Circuit:*

Appellees Paul Winans, Ethel Winans, Ross M. Winans, Audubon Winans and Linnaeous Winans (hereafter "the Winans") respectfully petition for a clarifica-

tion of the opinion of this Court filed May 4, 1956, and for a rehearing of the judgment of this Court reversing the judgment below in favor of the Winans, on the grounds that:

(1) The opinion requires clarification to set forth that the only portion of the judgment below reversed is paragraph 6 thereof which awarded money damages to the Winans.

(2) Costs should not have been awarded against appellees Winans, who were otherwise successful in having the judgment below in their favor (except as to paragraph 6 thereof) affirmed by this Court.

(3) The Court erred in its determination of Oregon law as to absolute privilege as immunizing appellants' wrongful conduct, in that:

(a) This Court's determination is contrary to the recent decision of the Oregon Supreme Court in *Grubb v. Johnson,* 61 Ore. Ad. 563, 289 P. (2d) 1067, November 23, 1955.

(b) Appellants' conduct was not part of a "judicial proceeding" under Oregon law.

(c) Policy considerations in administration of justice in Oregon do not here justify invoking doctrine of absolute privilege.

(4) The Court erred in viewing absolute privilege as having any bearing on this case, inasmuch as the Winans were damaged as a direct result of appellants' scheme to defraud the title company.

I.

Clarification of Opinion Required as to Portion of Judgment Below to Be Reversed

The opinion of this Court states:

"The judgment is modified by striking therefrom the portion thereof in favor of the Winans and against the Parkers and Stegmann, and as so modified, the judgment is affirmed." (Slip Op., p. 18)

There were two portions of the judgment below in favor of the Winans and against the Parkers and Stegmann, namely, paragraphs 5 and 6 thereof, providing:

"5. That the counterclaims of defendants, Chet L. Parker, Lois M. Parker and Walter Stegmann, against third-party defendants be and they hereby are dismissed with prejudice."

"6. That the third-party defendants have judgment for and recover of and from defendants, Chet L. Parker, Lois M. Parker and Walter Stegmann the sum of $9,000.00, and that said third-party defendants have judgment for and recover of and from said defendants, Chet L. Parker, Lois M. Parker and Walter Stegmann, their costs and disbursements herein incurred, taxed in the sum of $ ..... ." (Tr. 149)

The opinion of this Court requires clarification to set forth that the only portion of the judgment reversed is paragraph 6 thereof (set out above) which awarded money damages to the Winans. Lest advantage be taken of this Court's language, the judgment of the Court should make clear that paragraph 5 (set out above) of the judgment, which dismissed the counter-claims of the Parkers and Stegmann against the Winans, is affirmed.

As the record shows, when Winans filed their cross-claim for damages against the Parkers and Stegmann (Tr. 83-92), Chet Parker, in turn, filed a counterclaim against the Winans seeking recovery over against them of $125,000.00 in the event his title insurance policies were canceled, his claim being "based upon the allegations of plaintiffs' complaint and of the counterclaim of defendant Chet L. Parker" (Tr. 94-95).

Appellant Stegmann also filed a cross-claim against the Winans seeking to recover over against them any judgment against him in favor of the Title and Trust Company and to recover $10,000 attorneys fees by reason of the Winans "intentionally failing to disclose to defendant Stegmann the claims of the United States Government to said real property."

The District Court, as noted above, dismissed these counterclaims of Parker and Stegmann, finding that full disclosure as to the defect in the title to Lot 2 had been made both to the Parkers and to Stegmann.

On this appeal, both Parker and Stegmann specified as error the dismissal of their claims against the Winans (Tr. 2290-2291 and Parker Br., p. 68; Tr. 2296-2297 and Stegmann Br. p. 10).

In its opinion, this Court has upheld the trial Court's findings of the disclosures made by the Winans and of the knowledge of the Parkers and Stegmann of the defect in the title to Lot 2. Such being the case, there is no basis for any claims by the Parkers and Stegmann against the Winans, and none have been suggested. Accordingly, we ask that this Court specifically clarify its opinion in the respect requested herein.

II.

Costs Should not Have Been Awarded Against the Otherwise Successful Appellees Winans

The opinion of this Court orders that the Winans pay one-tenth of the appellate costs of the Parkers and Stegmann, evidently because of the reversal here of the damage award in favor of the Winans.

Under the circumstances of this appeal and the Court's decision herein, we submit to the Court that costs should not have been awarded as between the Winans, on the one hand, and the Parkers and Stegmann on the other.

There was considerably more at stake in this appeal for the appellees Winans than their money judgment against the Parkers and Stegmann. The Title and Trust Company had filed a third party action against them seeking recovery over against them of any judgment which Parkers might obtain against it (Tr. 61-71). Likewise, as we previously pointed out, both Chet Parker and Stegmann filed claims against the Winans to recover over from them in the event the title company obtained a cancellation of its title insurance policy.

The results of this appeal are that the appellees Winans have been sustained in all respects, except as to their damage award. With the clarification heretofore requested in the Court's opinion, it will be made clear that the judgment in the Winan's favor against the Parkers and Stegmann on the cross-claims of the latter, is affirmed; and in the usual course of events such

affirmance under the rules of this Court would result in allowance of costs to the appellees Winans.

Costs, by their very nature being within the discretionary domain of this Court, we ask this Court in its redetermination of this matter to take into consideration the fact that the Winans were brought into this case and hence into this appeal by the wrongful and malicious conduct of the Parkers and Stegmann. Even if this Court sees fit to rule that the malicious conduct and activities of the Parkers and Stegmann was absolutely privileged insofar as the Winans obtaining a damage judgment against them is concerned, surely the appellate discretion of this Court will not burden the Winans with one more expense to which they must be put.

III.

The Court Erred in its Determination of Oregon Law as to Absolute Privilege as Immunizing Appellants' Wrongful Conduct

We believe it to be a fair statement that this Court has concluded (Slip Op. p. 15) that the Winans cannot recover the damages they suffered at the hands of the Parkers and Stegmann in this case, because the latters' conduct was "absolutely privileged" under Oregon law as laid down in *Strycker v. Levell*, 183 Or. 59, 190 P. (2d) 922 (1948).

As Oregon lawyers, we respectfully suggest to this Court that it is applying the doctrine of absolute privilege under circumstances that no court in Oregon ever has, and, in fact, that its application is not justified by

and runs contrary to Oregon law, as evidenced by the most recent absolute privilege case of the Oregon Supreme Court, *Grubb v. Johnson,* 61 Ore. Adv. 563, 289 P. (2d) 1067 (Nov. 23, 1955).[1]

Decision Herein Contrary to Recent Grubb Case

In the *Grubb* case, defendants wrote the Oregon Insurance Commissioner, directing him to revoke a license theretofore issued to the plaintiff to be an insurance solicitor for the defendants and stating that the plaintiff has misappropriated to his own use certain funds. As a result, the plaintiff brought a libel action against the defendants for filing false charges against him causing a revocation of his license and received a jury verdict for general and punitive damages.

On appeal, the defendants contended that their letter to the Insurance Commissioner was absolutely privileged. The Oregon Supreme Court rejected this defense and affirmed the judment and, in so doing, reviewed the entire line of Oregon cases dealing with absolute privilege, summarizing them as follows (289 P. (2d) at 1071):

> "The Oregon cases, with only two apparent exceptions to be later noted, have limited the doctrine of absolute privilege to cases falling within the following categories: Those which involve the publication of statements by a judge in the course of judicial proceedings (*Irwin v. Ashurst,* 158 Or. 61, 274 P2d 1127); pleadings or publications filed by an attorney in the course of litigation (*McKinney v.*

[1]The *Grubb* case was decided after the argument in the instant appeals.

Cooper, 163 Or. 512, 98 P2d 711); private litigants or private prosecutors or defendants in a criminal prosecution (*Strycker v. Levell and Peterson*, 183 Or 59, 190 P2d 922); allegations by a party in a divorce action (*Pitts v. King et al.*, 141 Or 23, 15 P2d 379, 472); testimony of a witness in court (*Cooper v. Phipps*, 24 Or 357, 33 P 985); pertinent statements by counsel in a judicial proceeding (*Irwin v. Ashurst*, supra)."

As a matter of fact, the Oregon court pointed out that even in cases involving pleadings in a judicial controversy or the testimony of witnesses in a judicial proceeding, the rule of absolute privilege has *not* always been adhered to in Oregon, stating (289 P. 2d 1071-1072):

"In *Pitts v. King et al.*, supra, it was said that the weight of authority is to the effect that defamatory matter in a pleading is privileged 'if pertinent and relevant to the issues and made in good faith for the purposes of the case.'

"In *Cooper v. Phipps*, supra, the Court recognized a conflict of authority and stated that some of the cases hold that if a witness 'abuse his privilege by making false statements, which he knew to be impertinent and immaterial, and not responsive to quetsions propounded to him, for the purposes of malicious defamation, he may, upon an affirmative showing to that effect, be held in damages for libel or slander'."

The court further held that no Oregon decision ever extended the doctrine of absolute privilege to any case like the one involved in the *Grubb* case, and stated (289 P. 2d at 1072):

". . . the inferences to be drawn from our decisions militate strongly against any such extension."

Three aspects of the *Grubb* case are particularly noteworthy.

First, the defendants endeavored to justify their libelous communication as part of a judicial or quasi judicial proceeding authorized by Oregon statutes for the revocation of a solicitor's license, but the Oregon court refused to so extend any concept of a quasi judicial proceeding. Similarly, in this case the Parkers and Stegmann have sought to justify their tortious conduct as made in connection with judicial proceedings, but as is set forth in more detail *infra,* there was even less of a judicial proceeding involved in the instant case than in the *Grubb* case.

Secondly, we call to this Court's particular attention the way the Oregon Supreme Court has epitomized the Oregon case of *Strycker v. Levell,* 183 Or 59, 190 P (2d) 922 (which this Court has relied upon in its opinion), as standing *only* for the proposition that absolute privilege in judicial proceedings will be accorded to "private litigants or private prosecutors or defendants in a criminal prosecution." The accuracy of this summary appears from the very facts of the *Strycker* case, where the Court accorded absolute privilege to allegedly defamatory statements made by the very parties to an already instituted and pending judicial proceeding.[2]

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[2]This Court, in expanding the scope of the *Strycke*r case, has pointed to the citation therein of Restatement, Torts, Volume 3, Sections 587, 588, emphasized the language therein of communications "preliminary to a proposed judicial proceeding." The citation to the Restatement by the Oregon court was relied upon in the *Strycker* case in "substantial support" of its decision; and, of course, the language "as a part of a judicial proceeding" in the quoted extract from the Restatement fitted the very facts of the *Strycker* case.

Thirdly, the *Grubb* case is significant in demonstrating that the Oregon Supreme Court is completely unwilling to extend the doctrine of absolute privilege and will construe it as narrowly as possible. Thus, the Oregon Court stated that "courts are unwilling to extend the doctrine of absolute privilege" (289 P. (2d) at 1071), and quoted with approval from Prosser, Torts, Section 95 that "absolute immunity has been confined to a very few situations where there is an obvious policy in favor of permitting complete freedom of expression, without any inquiry as to the defendant's motives."

Defendants' Tortious Conduct was not part of a Judicial Proceeding under Oregon Law

To reach the conclusion that it has, this Court has taken the position that Parker's statements in dealing with the title company were made in connection with judicial proceedings, either as proposed parties to a lawsuit against the Winans or as prospective witnesses giving their expected testimony in support of a third party claim by the Title and Trust Company.[3]

Such a factual assumption is not borne out by the evidence in the record. The conferences between the

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[3]When this Court states "the third-party complaint was filed against the Winans by the title company and in its own name in line with this insistence of Parker (Slip Op. p. 14), it is misconstruing the evidence which shows that after the title company and Parker were unable to agree on a settlement of his claim, the title company became suspicious of the Parkers and, after conducting an investigation, filed its original complaint against them, charging the Parkers with knowledge of the title defect and failure to disclose the same (Tr. 2241). The original complaint that was filed by the title company was thus not the suit which this Court states the Parkers wanted the title company to file in is own name.

Title and Trust Company and the Parkers were held to settle the claim of loss which the Parkers had filed (Tr. 1839; Finding XLIII, Tr. 140). The various proposed agreements submitted by the title company to settle the Parkers' claim contained provisions for the subsequent prosecution of a suit against the Winans; but these agreements were never consummated and the title company became suspicious and refused to proceed any further.

To say that the false statements made by the appellants during these negotiations were communications preliminary to a proposed judicial proceeding goes way beyond Oregon law, for no Oregon decision has ever ruled on extending absolute privilege to persons not parties to an action who are maliciously responsible for the inclusion of defamatory material in a pleading.

The communications by the Parkers were not, in Lord Mansfield's classic language, made "in office", that is, they were not made in the character of a witness or litigant in the performance of a public duty. Instead, Parker's fraudulent communications were found by the District Court to be made in furtherance of the conspiracy between the Parkers and Stegmann to defraud the Title and Trust Company (Finding XLVI, Tr. 142).

Although Oregon law does not have a case squarely in point on the non-applicability of absolute privilege to the appellants' communications, the law of other common law jurisdictions does. We ask this Court to examine these cases in light of the status of Oregon law as enunciated in the *Grubb* case: *Laun v. Union Electric Co.*, 350 Mo. 572, 166 S. W. (2d) 1065 (1942); *Rice v.*

v. Coolidge, 121 Mass. 393 (1876); *Ewald v. Lane,* 104 F. (2d) 222 (DC DC, 1939); *Bigelow v. Brumley,* 138 Ohio St. 574, 37 N.E. (2d) 584 (1941); *Annotation,* 144 A.L.R. 633.

Policy Considerations in the Administration of Justice do not here Require the Doctrine of Absolute Privilege

All of us concerned with the administration of justice are in accord with the statement of this Court that:

> ". . . it is of fundamental importance in the administration of justice that witnesses and parties to suits should not be called to account in private suits for defamation . . . for what they have to say in connection with pending litigation. . ." (Slip Op., p. 17).

But such a laudible purpose finds no application in the present case. The policy upon which the rule of absolute privilege is founded can hardly be said to be effectuated by enabling persons engaged in a fraudulent scheme to enmesh others therein and then seek judicial sanctity on grounds that the administration of justice will be furthered by their being freely allowed to damage innocent persons.

The *Grubb* case shows that the Oregon Supreme Court as a policy matter will not extend instances of absolute privilege beyond the very limited instances noted by it. Certainly no one has yet suggested how extending the doctrine of absolute privilege to malicious schemers like Parkers and Stegmann will in any way cripple the wholesome policy of allowing witnesses "in office" to be absolutely privileged with respect to their relevant testimony.

IV.

The Court Erred in Viewing Absolute Privilege as Having any Bearing on this Case

We recognize that a petition for rehearing should not traverse well-plowed ground, but any reading of this Court's opinion indicates that this Court has failed to meet the main point made on the oral argument of this case before the Court, namely, that the doctrine of absolute privilege has no bearing or application in this case, inasmuch as the Winans were damaged as a direct result and as part and parcel of the appellants' scheme to defraud the Title and Trust Company.

Although appellants were represented by one of Oregon's most capable and illustrious attorneys, the first mention that ever appeared of privilege was in appellants' brief before this Court. Privilege was neither pleaded by the appellants nor ever presented to the District Court in the lengthy trial, briefing and arguments that took place below. This Court's ruling that it was unnecessary to plead privilege affirmatively (Slip Op., p. 16) should not obscure the fact that the Winnans' cross-claim was tried below on the basis that the Parkers and Stegmann engaged in a conspiracy to defraud the title company, which resulted in subsequent damage to the Winans.

Under the law of Oregon, as no doubt that under all other jurisdictions, tort feasors are liable for all of the reasonably foreseeable consequences of their conduct. *Gilman v. Burlingham,* 188 Or. 418, 423, 216 P.

(2d) 252, 255 (1950). That the Parkers and Stegmann were such tort feasors appears from the findings of the District Court that they "entered into a conspiracy" to defraud the Title and Trust Company, with which finding this Court has agreed. It was "pursuant to and in furtherance of the conspiracy between" the Parkers and Stegmann that the District Court found that the false representations were made to the title company, which thereafter resulted in the Winans being involved in this case with consequent damage to themselves.

In its reconsideration of this matter, we ask the Court to bear in mind that the Winans were used as necessary pawns by the Parkers and Stegmann to effectuate their scheme of defrauding the title company. When it came time to collect on the title policy these pawns had to be sacrificed with the sacrifice taking the form of falsely and maliciously misrepresenting the Winan's prior dealings with full knowledge of the ensuing damage which would thereafter be visited upon the Winans.

No cases have been cited by this Court that such conduct is absolutely privileged. Moreover, we dare say that there never could be any case which would grant an absolute privilege to a group of individuals to engage in a scheme to defraud a title company and as part of that scheme to make false and malicious representations concerning other innocent persons, as a result of which these persons are forced to defend a lawsuit in which their names and reputations are impugned and their businesses damaged.

CONCLUSION

For the reasons set forth above, we respectfully submit that the opinion of this Court should be clarified as requested herein and that this Court grant our petition for a rehearing of the judgment herein reversing the judgment of the Court below awarding money damages to the Winans.

Respectfully submitted,

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GUNTHER F. KRAUSE,
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Attorneys for Appellees Winans
and Petitioner.

CERTIFICATE OF COUNSEL

IT IS HEREBY CERTIFIED that in the judgment of the undersigned, the foregoing petition is well-founded, and is not interposed for delay.

Dated at Portland, Oregon, June 1, 1956.

DENNIS LINDSAY,
Of Counsel for Appellees Winans
and Petitioner.